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No. 29012.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 70.

JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS AND AGENT DESIGNATED BY THE PRESIDENT UNDER TRANSPORTATION ACT, 1920, PETITIONER,

VS.

GEORGE WECHSLER, RESPONDENT.

SUPPLEMENTAL BRIEF OF PETITIONER IN SUPPORT OF WRIT OF CERTIORARI.

The petitioner herein filed in this Honorable Court with his petition for writ of certiorari a statement of the case and specification of the errors relied upon, which were entitled, "The Questions Involved," and a brief and argument and the authorities relied upon in support thereof, all of which is embodied herein for more ready reference by the court, where the references relate to

the record prepared under the supervision of the clerk of this court instead of to the record filed by the petitioner. The purpose of this supplementary brief is to present additional points and authorities in support thereof under Subdivision II entitled, "Neither the petitioner herein nor his predecessor waived the provisions of General Order 18-A, but upon the contrary urged its enforcement throughout."

STATEMENT OF FACTS.

This action was originally instituted in the Circuit Court of Jackson County, Missouri, at Kansas City, by the respondent herein against Walker D. Hines, as Director General of Railroads for damages for personal injuries alleged to have been sustained by respondent on January 3, 1920, while a passenger on a passenger train operated by Walker D. Hines, Director General of Railroads. Hines was your petitioner's predecessor operating the Chicago Great Western Railroad. The injury was caused by the train becoming derailed at Wyeth, Andrew County, Missouri. Plaintiff therein at the time of the accrual of his cause of action, and at the time of the trial, was a citizen and resident of the State of Illinois.

Long prior to the injury complained of and under date of April 9th, 1918, W. G. McAdoo as Director General of Railroads issued an order generally known and designated as General Order No. 18, which is as follows:

General Order No. 18.

"Whereas the Act of Congress approved March 21, 1918, entitled *An Act to Provide for the Operation of Transportation Systems While Under Federal Control*, provides (Section 10) 'That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at

common law, except in so far as may be inconsistent with the provisions of this act or with any order of the President. * * * But no process, mesne or final, shall be levied against any property under such Federal control'; and

Whereas it appears that suits against the carriers for personal injuries, freight and damage claims are being brought in states and jurisdictions far remote from the place where plaintiffs reside or where the cause of action arose; the effect thereof being that men operating the trains engaged in hauling war materials, troops, munitions, or supplies, are required to leave their trains and attend court as witnesses, and travel sometimes for hundreds of miles from their work, necessitating absence from their trains for days and sometimes for a week or more; which practice is highly prejudicial to the just interests of the Government and seriously interferes with the physical operation of the railroads; and the practice of suing in remote jurisdictions is not necessary for the protection of the rights or the just interests of plaintiffs,

It is therefore ordered, that all suits against carriers while under Federal control must be brought in the county or district where the plaintiff resides, or in the county or district where the cause of action arose.

W. G. McAdoo,
Director General of Railroads."

Thereafter and under date of April 18, 1918, said McAdoo as such Director General issued what is generally known and designated as General Order No. 18-A, which is as follows:

"General order No. 18 issued April 9, 1918 is hereby amended to read as follows:

'It is therefore ordered that all suits against carriers while under Federal control must be

brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose.'

W. G. McAdoo,
Director General of Railroads."

This suit was instituted by respondent by filing his petition in the Circuit Court of Jackson County, Missouri on January 29th, 1920, and at sundry times thereafter made amendments thereto. The defendant answered on January 23, 1921, in addition to a general denial as follows (Record, page 7):

"Defendant further answering plaintiff's amended petition states that at all times mentioned in plaintiff's amended petition there was in full force and effect and binding upon the parties hereto a certain law embodied in general order of the Director General of Railroads known and described as General Order No. 18-A, issued April 18, 1918, wherein and whereby it is provided that all suits against carriers while under Federal control must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action, or in the county or district where the cause of action arose.

Defendant further states that plaintiff, at the time plaintiff charges he was injured and at the time of the institution of this suit, was not a resident of Jackson County, Missouri, nor of the district in which this suit was filed, but was a resident of the State of Illinois; that plaintiff further charges that he was injured at a point near Wyeth, Missouri, and that said point is not located in Jackson County, Missouri, and not in either the county or the district in which suit was filed, and therefore, that said suit was not instituted or brought

> either in the county or district where the plaintiff resided at that time of the accrual of the cause of action or in the county or district where the cause of action arose; and that in consequence thereof, this court is without jurisdiction to try or determine any issues in this case or to proceed therewith.
>
> Wherefore, defendant prays that said cause be dismissed."

Thereafter, on February 26, 1921, plaintiff therein filed a reply which, so far as material here, is as follows (Record, page 9):

> "Plaintiff denies that general order No. 18a referred to in the answer was in full force and effect and binding upon the parties hereto, and denies that same was a law affecting or controlling the parties hereto, and denies that this court is without jurisdiction to try and determine the issues in that case.
>
> Plaintiff states that said general order No. 18a is now and at all times referred to in the petition was wholly and utterly void and beyond the powers of the Director General of Railroads to make or enforce, and in conflict with the Act of Congress, March 21st, 1918, which provided that actions at law might be brought against carriers and judgments rendered as then provided by law."

On February 25, 1921, and after the filing of said answer and *one day before* filing said reply, the Circuit Court made an order substituting John Barton Payne as defendant for Walker D. Hines, resigned. This substitution thus appears in the record on page 8:

> "Thereafter and on February 25th, 1921, and during the January Term, 1921, of said court, plaintiff again amended his petition by interlinea-

tion, and John Barton Payne, director general of railroads and agent designated by the President under Transportation Act 1920, was substituted by agreement as successor of said Walker D. Hines, and said substituted defendant entered his appearance in said cause and adopted the answer theretofore filed by said Walker D. Hines, defendant, and the court made an entry of record that such proceedings were had. Said amendment to said petition in addition to the substitution of defendant as aforesaid was as follows:"

Your petitioner herein and defendant in the trial court objected at all stages of the proceeding to the jurisdiction of the Jackson County Circuit Court, because not within the county or district where the cause of action arose, nor where plaintiff resided. In answer to this objection during the trial, plaintiff's counsel said (Record, page 16):

> "In answer to the suggestion of counsel for the defendant, I call the attention of the court to the fact that General Order No. 18-A in direct conflict with the Act of Congress of March 21, 1918, which provides that actions at law may be brought against carriers, and judgments returned, as provided by law; that the Act of Congress antedated the so-called 'General Order' of the Director General of Railroads No. 18-A, the act having been passed March 21, 1918, and the General Order 18-A having been issued of date some time near April, 1918. I call the court's further attention to the fact that it has been held by every court in the United States which has had occasion to pass on the matter, that the so-called Order No. 18-A is wholly and utterly void because it is in conflict with the Act of Congress, herein referred to."

After the trial of this case and before the decision by the Kansas City Court of Appeals, and on November 7, 1921, this Honorable Court decided in the case of *Alabama and Vicksburg Ry. Co.* v. *Journey*, 42 Supreme Court Reporter 6, that General Order No. 18-A was valid and binding.

The Kansas City Court of Appeals held that by the entry of substitution above quoted the defendant waived the provisions of General Order 18-A, although as a part of the order the defendant adopted the answer pleading the lack of jurisdiction of the court, and although no waiver was suggested by pleading or otherwise in the trial court.

From this decision of the Kansas City Court of Appeals rendered on April 3, 1922, your petitioner applied to the Supreme Court of the State of Missouri for a writ of certiorari, by reason of said court having a supervisory control over the decisions of said Court of Appeals, which application was denied on May 22, 1922.

THE QUESTIONS INVOLVED AND SPECIFICATION OF THE ERRORS RELIED ON.

Your petitioner further states that the questions involved herein and the errors relied upon are as follows:

First. General Order No. 18-A of the Director General of Railroads relates to jurisdiction over the subject matter of the action, and is not subject to waiver by the parties or either of them.

Second. Neither the petitioner nor his predecessor waived the provisions of General Order 18-A, but on the contrary urged its enforcement throughout.

Third. The non Federal grounds upon which the Kansas City Court of Appeals attempts to dispose of this case are entirely untenable, and are in no sense binding on this court. The federal question is inherently involved and is the only tenable basis of decision.

Fourth. The decision of the Kansas City Court of Appeals deprives this petitioner of his rights of defense given him under the laws of the United States, and particularly General Order 18-A of the Director General of Railroads.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

General Order No. 18-A of the Director General of Railroads relates to jurisdiction over the subject matter of the action, and is not subject to waiver by the parties, or either of them.

This suit was instituted contrary to and in direct violation of the provisions of General Order Number 18-A of the Director General of Railroads for the reason that at all times the plaintiff was a citizen and resident of the State of Illinois, and the cause of action accrued at or near Wyeth, in the County of Andrew, State of Missouri, while the suit was instituted in the Circuit Court of Jackson County, Missouri, at Kansas City, and thus it is necessary to determine the effect of General Order Number 18-A as bearing upon the validity or invalidity of the decision of the Missouri courts in this case.

In *Alabama and Vicksburg Railway Co.* v. *Journey*, 42 Supreme Court Reporter 6, this Honorable Court decided that General Order No. 18-A of the Director General of Railroads was valid and binding.

In that case, this court referring to General Order No. 18-A states that such order:

> "PROHIBITED the institution of suits against railroads under Federal control in the court for any district other than that which the plaintiff

had resided or in which the alleged cause of action arose."

General Order Number 18-A referred to in the opinion of the court provides that:

> "All suits against carriers while under Federal control MUST be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose."

The Kansas City Court of Appeals in its opinion in this case holds:

> "The Circuit Court of Jackson County, Missouri, had jurisdiction of the subject matter of this suit but under General Order Number 18-A had no jurisdiction over the person of defendant's predecessor, Hines, unless he chose to voluntarily submit to the jurisdiction of the court."

That court then proceeded to hold that under the record entries as shown by the abstract of record the appellant, James C. Davis, Director General and Agent and his predecessor, John Barton Payne, had entered their voluntary appearance, and that therefore the provisions of General Order Number 18-A did not apply.

This ruling and decision overlook the very language itself of General Order Number 18-A and the language of this court in construing General Order Number 18-A, from both of which it conclusively appears that the Circuit Court *did not have jurisdiction of the subject matter of this action;* that by the very terms of the Order, no court had jurisdiction of the subject matter of the action excepting certain courts

within certain territorial limitation prescribed in the Order.

It appears from the very purpose of the making of this Order, that it was the intent of the Director General that there should be a territorial limit within which suits might be brought and without which suits could not be brought. A reference to General Order Number 18 (afterwards amended as 18-A) shows that the purpose of this order was to save the expense and time of having railroad witnesses in attendance at the trial of suits at places far distant from the place of their usual employment. Consequently the Order provides that *suits* against carriers while under Federal control *must* be brought within certain districts.

The language of the Order is definite, unambiguous and, we submit, not subject to any other construction than that it was intended thereby to PROHIBIT ANY COURT FROM TAKING JURISDICTION OF THE SUBJECT MATTER OF THE ACTION, excepting courts within the territorial limits prescribed.

It is well settled that the jurisdiction of the subject matter cannot be waived by the voluntary appearance of the parties and that where the court is denied jurisdiction of the subject matter, such jurisdiction cannot be conferred by consent of the parties.

Title Guaranty and Surety Company v. *Drennan*, (Mo. App.) 208 S. W. 474.
St. Louis v. *Glasgow*, 254 Mo. 262, l. c. 290.
4 Corpus Juris, 1349.

The order of the Director General has the effect of taking away for the time being the transitory nature of suits for personal injuries and making them local in their nature and requiring them to be brought in certain jurisdiction only.

The case is not unlike those involving statutes which require suits relating to real estate to be brought within the counties in which the real estate lies. In such cases the Circuit Court in another county would not have jurisdiction to entertain an action notwithstanding it is a court of general jurisdiction and such jurisdiction could not be conferred by consent.

Bray v. *Marshall*, 66 Mo. 122.
Snitzer v. *Downey*, 80 Mo. 586.

Likewise the Courts of Appeal in Missouri have jurisdiction of cases appealed from the Circuit Courts of certain counties only and they could not acquire jurisdiction even by consent of appeals taken from Circuit Courts in counties other than those specified by statutes.

State ex rel. v. *Nixon*, 232 Mo. 496.

Furthermore the jurisdiction of Courts of Appeal is limited to cases involving seventy-five hundred dollars and less. Clearly the jurisdiction could not be conferred upon the Court of Appeals by consent of parties in cases involving an amount greater than that sum.

McCary v. *McCary*, 217 S. W. 547.
Little River Drainage District, 282 Mo. 458.

We submit therefore that the Kansas City Court of Appeals has overlooked the explicit and definite language

of General Order Number 18-A from which it appears that the Circuit Court of Jackson County, Missouri, DID NOT HAVE JURISDICTION OF THE SUBJECT MATTER OF THIS ACTION, and that such jurisdiction could not be conferred even by consent.

II.

Neither the petitioner herein nor his predecessor waived the provisions of General Order Number 18-A, but upon the contrary urged its enforcement throughout.

Assuming for the sake of argument (though vehemently denying it as a matter of fact) that General Order Number 18-A of the Director General of Railroads relates to the jurisdiction over the person, and was in consequence thereof subject to waiver by the parties, even under these circumstances there was no waiver by this petitioner or his predecessor as Director General of Railroads.

The order of the trial court which is claimed to be a basis of the waiver of the provisions of General Order Number 18-A made on February 25th, 1921, was simply an order of substitution of defendants and expressly provides as an inherent part of the order of substitution that the incoming defendant, John Barton Payne, adopted the answer therefore filed by said Walker D. Hines, his predecessor. The answer which was thus adopted expressly pleaded General Order Number 18-A, and that in consquence thereof, that the court was entirely without jurisdiction to try or determine any issues in said case, or to proceed therewith. *The next day*

following the substitution of the defendants and on February 26th, 1921, the plaintiff filed a reply to said answer alleging that General Order No. 18-A was invalid and void because in conflict with the Act of Congress of March 21, 1918, which provided that actions at law might be brought against the carrier and judgment rendered as then provided by law. This, we submit, was absolutely inconsistent with any thought of waiver.

The plaintiff did not at that time nor at any other time in the trial court allege, claim or charge a waiver of the provisions of General Order 18-A. The issue was squarely made by the pleadings whether this order was valid or void. This court thereafter held in the Journey case that it was valid.

The records above referred to show clearly and emphatically that the substituted defendant did not intend to and did not in fact enter a general appearance, and that the order was not treated as a general appearance by the parties or by the court.

In the case of *ex rel Bulger* v. *Southern*, 278 Mo. 610, l. c. 621, the Missouri Supreme Court says:

> "In an ordinary action an appearance solely to challenge jurisdiction for lack of service gives no jurisdiction of the person. Whether, in such an action, an appearance is general or special is one of intent, and the intent is to be determined from the facts at the time."

Not only was the order of substitution treated as a special appearance by the parties at the time the order was made, but the contention of the parties was contin-

ued at the trial as to the validity or invalidity of General Order Number 18-A.

After trial and judgment the petitioner was substituted as defendant, but this could not affect jurisdiction to try the cause.

(The following under this question does not appear in the original brief filed by the petitioner in this cause):

It is beyond argument now that the United States took a complete and not a divided control of the railroad systems, and that the United States operated them directly and without the intervention in any way of the owners.

Northern Pacific Ry. Co. v. *North Dakota*, 250 U. S. 135.
Mo. Pac. R. R. Co. v. *Ault*, 256 U. S. 554.

It is also beyond question that actions and suits against the Director General of Railroads or the Agent designated by the President under Transportation Act, 1920, were suits against the United States. The real party in interest was the United States, and the court will always consider the nature of the case, and determine whether the Government is the real party in interest, although it is not named.

Ex parte Ayers, 123 U. S. 443.
Hagood v. *Southern*, 117 U. S. 52, 67.
In re E. J. Hibner Oil Co., 264 Fed. 667.
Cases cited in preceding paragraph.

It also seems beyond argument that the United

States cannot be sued without its consent. This is a privilege of sovereignty.

Hans v. *Louisiana*, 134 U. S. 1.
Ex parte Ayers, 123 U. S. 443.

The statutes which permit the United States to be sued, or which strip the Government of any portion of its prerogatives are in derogation of its sovereignty and will be most strictly construed.

It will be borne in mind that the law in question giving individuals a right to sue the United States in certain cases is not a limitation or restriction of a cause of action theretofore existing, but is the creation of a new liability.

United States, ex rel. Texas Portland Cement Co. v. *McCoy*, 233 U. S. 157, is a case which involves the statute giving the creditors of a contractor for the United States the right to sue in the name of the United States upon the contractor's bond, if the United States itself did not bring suit within six months. In that case the United States did not sue, and indicated that it would not sue, and thereupon a suit was brought by a creditor of the contractor in the name of the United States before the expiration of the six months period. Other creditors intervened in the suit after the expiration of the six months period, and within the time provided by law. This Honorable Court held that the plaintiff in the suit was not entitled to recover because not brought within the limitations of the law creating the right to sue, and on page 162 said:

"By this statute a right of action upon the bond is created in favor of certain creditors of the contractor. The cause of action did not exist before and is the creature of the statute. The act does not place a limitation upon the terms named in the statute. The right of action given to creditors is specifically conditioned upon the fact that no suit shall be brought by the United States within the six months named, for it is only in that event that the creditors shall have a right of action and may bring a suit in the manner provided. The statute thus creates a new liability and gives a special remedy for it, and upon well settled principles the limitations upon such liability become a part of the right conferred and compliance with them is made essential to the assertion and benefit of the liability itself. *Pollard* v. *Bailey*, 20 Wall. 520, 526-7; *Bank* v. *Francklyn*, 120 U. S. 747, 756; *Globe Newspaper Co.* v. *Walker*, 210 U. S. 356; *United States* v. *Boomer*, 183 Fed. Rep. 726 (Circuit Court of Appeals for the Eighth Circuit).

"The purpose of Congress to give the United States the exclusive right to bring suit within six months is stated in terms too plain to be mistaken or to require construction, because of any possible uncertainty in their meaning. When this is so it becomes unnecessary to inquire into the reasons which induced the legislation."

Western Union Telegraph Co. v. *Poston*, 256 U. S. 662.

Miller v. *American Bonding Co.*, 42 Sup. Ct. Rep. 98.

Douglass v. *Lewis*, 131 Mo. 75.

In *Northern Pacific Railway Company* v. *Whalen*, 149 U. S. 157, this court in passing upon the right of a railroad company to enjoin keepers of saloons near the line of its roads from maintaining such a place as a

nuisance, says with respect to the statute upon subject (l. c. 164):

> "But this section, creating a new liability, unknown to the common law, is to be strictly construed, and is not to be extended beyond the clear import of its terms."
>
> Lewis' Sutherland Statutory Construction, (Second Ed.) Sec. 558.
>
> *Troy & Greenfield R. R. Co.* v. *Commonwealth*, 127 Mass. 43.
>
> *McArthur Brothers Co.* v. *Commonwealth*, 197 Mass. 137.
>
> *Mason* v. *Cooper*, 19 Georgia, 543.

The petitioner herein as Director General of Railroads could not enlarge the powers given by Congress to sue the United States. In other words, if the respondent herein did not have authority under the law to institute this suit in the manner pursued by him, then this authority could not be granted by the Director General of Railroads, much less by the trial attorney acting for him in a given case.

Thus, in the case of *Carr* v. *United States*, reported in 98 U. S. 433, it was held that consent by the United States to be sued, must be evidenced by an act of Congress, and that Government officers cannot waive the privilege of the United States in this respect.

And again, in the case of *Stanley* v. *Schwalby*, 162 U. S. 255, this court speaking through Mr. Justice Gray said at page 269:

> "It is a fundamental principle of public law, affirmed by a long series of decisions of this court, and clearly recognized in its former opinion in this

> case, that no suit can be maintained against the United States, or against their property, in any court without express authority of Congress. 147 U. S. 512. See also *Belknap* v. *Schild,* 161 U. S. 10. The United States, by various acts of Congress, have consented to be sued in their own courts in certain classes of cases; but they have never consented to be sued in the courts of a state in any case. Neither the Secretary of War nor the Attorney General, nor any subordinate of either, has been authorized to waive the exemption of the United States from judicial process, or to submit the United States, or their property, to the jurisdiction of the court in a suit brought against their officers. *Case* v. *Terrell,* 11 Wall. 199, 202; *Carr* v. *United States,* 98 U. S. 433, 438; *United States* v. *Lee,* 106 U. S. 196, 205."

It has been held by the Supreme Court of Oregon in the case of *Goldsmith* v. *Revenue Cutter,* 6 Oregon, 250, that even by pleading to the merits, the Government of the United States does not waive its exemption from process. It, therefore, follows from the authorities that one bringing suit against the United States must bring himself directly within an act of Congress authorizing the suit.

The principle is thus expressed in 39 Cyc., 776:

> "Consent by the United States to be sued must be evidenced by an act of Congress, and Government officers cannot waive its privilege in this respect, or lawfully consent that such a suit may be prosecuted so as to bind it."

III.

The non-federal grounds upon which the Kansas City Court of Appeals attempts to dispose of this case are entirely untenable and are in no sense binding upon this court. The federal question is inherently involved and is the only tenable basis of decision.

We have endeavored to show that the position taken by the Kansas City Court of Appeals to the effect that there was a waiver by the petitioner's predecessor of the provisions of General Order Number 18-A, is entirely untenable and not founded in any sense upon the facts and circumstances shown by the record in this case. Therefore, the question for decision is within the jurisdiction of this court, and it is within the province of this court to determine not only whether the right given to petitioner and his predecessor under the provisions of General Order 18-A were denied in express terms, but also whether or not they were denied in substance or effect by putting forward non-federal grounds of decisions that were without any fair or substantial support.

In *Ward* v. *Love County*, 253 U. S. 17, on pages 21 and 22, the court says:

> "The county challenges our jurisdiction by a motion to dismiss the writ of certiorari and by way of supporting the motion insists that the Supreme Court put its judgment entirely on independent non-federal grounds which were broad enough to sustain the judgment."
>
> * * * * * * *
>
> "Whether the right was denied, or not given due recognition, by the Supreme Court is a ques-

tion as to which the claimants were entitled to invoke our judgment, and this they have done in the appropriate way. It, therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support. *Union Pacific R. R. Co.* v. *Public Service Commission*, 248 U. S. 67; *Leathe* v. *Thomas*, 207 U. S. 93, 99; *Vandalia R. R. Co.* v. *South Bend*, *ibid.* 359, 367; *Gaar Scott & Co.* v. *Shannon*, 223 U. S. 468; *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261; *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.*, 243 U. S. 157, 164. And see *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436, 443; *Hunnington* v. *Attrill*, 146 U. S. 657, 683-684; *Boyd* v. *Thayer*, 143 U. S. 135, 180; *Carter* v. *Texas*, 177 U. S. 442, 447. Of course, if non-federal grounds, plainly untenable, may be thus put forward successfully, our power to review may easily be avoided. *Terre Haute & Indianapolis R. R. Co.* v. *Indiana*, 194 U. S. 579, 589."

In *Union Pacific R. R. Co.* v. *Public Service Commission*, 248 U. S. 67 (syllabus):

> "A Utah corporation, operating an extensive railroad through several states, with but slight mileage, and small proportion of its property, and no intrastate business, in Missouri, seeking to issue over $30,000,000 bonds under mortgage of its whole line to meet expenditures incurred but in small part in that state, was charged for the privilege, by a Missouri commission, over $10,000, calculated by a percentage of the entire issue. Held, a direct, unconstitutional interference with interstate commerce."

Upon these facts this court says on page 69:

> "The Supreme Court of the state avoided this question by holding that the application to the Com-

mission was voluntary and hence that the Railroad Company was estopped to decline to pay the statutory compensation. It is argued that a decision on this ground excludes the jurisdiction of this court. But the later decisions show that such is not the law and that on the contrary it is the duty of this court to examine for itself whether there is any basis in the admitted facts, or in the evidence when the facts are in dispute, for a finding that the federal right has been waived. *Creswill* v. *Knights of Pythias,* 225 U. S. 246. Were it otherwise, as conduct under duress involves a choice, it always would be possible for a state to impose an unconstitutional burden by the threat of penalties worse than it in case of a failure to accept it, and then to declare the acceptance voluntary, as was attempted in *Atchison, Topeka & Santa Fe Ry. Co.* v. *O'Connor,* 223 U. S. 280."

This court then holds that the constitutional question was not waived regardless of the State Court decision, and rendered judgment accordingly.

In *Creswill* v. *Knight of Pythias,* 225 U. S. 246, this court on page 261 declare this doctrine as follows:

"While it is true that upon a writ of error to a state court we do not review findings of fact, nevertheless two propositions are as well settled as the rule itself, as follows: (a) that where a federal right has been denied as the result of a finding of fact which it is contended there was no evidence whatever to support and the evidence is in the record the resulting question of law is open for decision; and (b) that where a conclusion of law as to a Federal right and findings of fact are so intermingled as to cause it to be essentially necessary for the purpose of passing upon the Federal question to analyze and dissect the facts, to the extent necessary

to do so the power exists as a necessary incident to a decision upon the claim of denial of the Federal right. *Kansas City So. Ry. Co.* v. *Albers Com. Co.*, 223 U. S. 573, 591; *Cedar Rapids Gas Co.* v. *Cedar Rapids*, Ib. 655, 668; *State of Washington ex rel* v. *Fairchild*, 224 U. S. 510. The contentions here made bring this case under the first category, since the insistence here is that there was not any evidence justifying the findings made by the court concerning fraudulent purpose, injury to property, deception of the public, etc."

We submit that the conclusion of the Kansas City Court of Appeals upon the question of waiver was without any fair or substantial support. If such a decision was binding upon this court, it may thus be seen that the power to review given under the law to this court may easily be avoided.

We submit that the petitioner and his predecessor in this case were deprived of the rights given to them under the federal law bearing upon jurisdiction of the court, and that the writ of certiorari should go.

O. H. DEAN,
ROY B. THOMSON,
ALBERT E. STOLL,
Attorneys for Petitioner.

FILED
OCT 1 1923
WM. R. STANSBU
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No. 29012.

In the

Supreme Court of the United States

October Term, 1923.

No. 70.

JAMES C. DAVIS, Director General of Railroads and Agent designated by the President under Transportation Act, 1920, *Petitioner*,

vs.

GEORGE WECHSLER, *Respondent*.

RESPONDENT'S MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF.

WILLIAM S. HOGSETT,
MURAT BOYLE,
MONT T. PREWITT,
Counsel for Respondent.

SMITH-GRAVES LAW PRINTING, KANSAS CITY, MO.

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No. 70.

JAMES C. DAVIS, Director General of Railroads and Agent designated by the President under Transportation Act, 1920, *Petitioner,*

vs.

GEORGE WECHSLER, *Respondent.*

No. 29012.

NOTICE OF MOTION TO DISMISS.

To James C. Davis, Director General of Railroads and Agent designated by the President under Transportation Act, 1920, Petitioner, and O. H. Dean, H. M. Langworthy, Roy B. Thomson and M. W. Borders, counsel for petitioner:

You and each of you are hereby notified that on Monday, October 22nd, 1923, at the convening of court, or as soon thereafter as counsel can be

heard, the undersigned will present and submit to the Supreme Court of the United States his motion to dismiss the petition in the above entitled cause, and brief in support thereof, a true copy of which motion and brief are hereto attached and made a part hereof.

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William J. Hogsett

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Mont T. Prewitt

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Counsel for Respondent.

Service of the foregoing notice, and of a copy of motion and brief referred to therein, are hereby acknowledged this.....day of September, 1923.

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Counsel for Petitioner.

In the Supreme Court of the United States.
October Term, 1923.
No. 70.

James C. Davis, Director General of Railroads and Agent designated by the President under Transportation Act, 1920, Petitioner,

vs. No. 29012.

George Wechsler, Respondent.

RESPONDENT'S MOTION TO DISMISS.

Now comes George Wechsler, respondent in the above cause, and moves the court to dismiss the petition herein for the following reasons, to-wit:

1. Because the petitioner is in default under Rule 21 of this court in having failed to file the brief required by said rule.

2. Because the petitioner has not filed a specification of the errors relied upon by petitioner, as required by paragraph 2 of Rule 21 of this court.

3. Because the petitioner has not made service upon the respondent or his counsel of a copy of brief, as required by paragraph 7 of said Rule 21.

4. And in support of this motion respondent states that the petition for the writ of certiorari was filed herein by petitioner on July 3rd, 1922. That petitioner accompanied said petition with a brief denominated by him "Brief in Support of Petition for Writ of Certiorari." That said brief did not contain any specification of the errors relied upon, as required by Rule 21; and that said brief did not and does not comply with the re-

quirements of said Rule 21. That the writ of certiorari was granted by this court on October 16th, 1922. That thereafter, on November 11th, 1922, return to said writ was duly filed with the clerk of this court. That thereafter, in due time, thirty copies of the record were printed under the clerk's supervision, and copies thereof were distributed and delivered by the clerk to the respective counsel for petitioner and respondent, at a date which is not exactly known to respondent, but which was at least ninety days before the first day of the October Term, 1923. That thereafter this cause was, in the regular course, placed upon the docket of this court for the October Term, 1923, and is numbered 70 thereon; and that according to the present position of the cause upon the docket, the cause will be called for argument on or about October 8th, 1923.

That the petitioner and his counsel have filed no brief for the final hearing, and have filed no other or further brief in this cause except the aforesaid "Brief in Support of Petition for Writ of Certiorari;" and that said brief so filed does not contain any specification of errors.

That therefore petitioner has wholly failed to comply with the requirements of Rule 21.

Wherefore respondent moves the court to dismiss the petition herein.

William A. Hogsett

Mont. T. Reeves

Attorneys for Respondent.

RESPONDENT'S BRIEF IN SUPPORT OF MOTION TO DISMISS.

The facts material to this motion are as follows:

The petition for the writ of certiorari was filed herein on July 3rd, 1922, accompanied by a brief denominated by petitioner "Brief in Support of Petition for Writ of Certiorari." Said brief did not contain any specification of errors, and does not comply, or purport to comply, with the requirements of Rule 21 of this Court. The writ of certiorari was granted October 16th, 1922, and return to the writ was filed herein on November 11th, 1922. In due time thereafter thirty copies of the record were printed under the clerk's supervision, and copies thereof were distributed and delivered to respective counsel for petitioner and respondent, at a date which is not exactly known to respondent, but which was at least ninety days before the first day of the October Term, 1923. The case was in due course placed upon the docket for the October Term, 1923, and will be called for argument probably on or about October 8th, 1923.

Petitioner has filed no other or further brief except the aforesaid "Brief in Support of Petition for Writ of Certiorari;" and that brief so filed does not contain any specification of errors whatever.

I.

The petition should be dismissed for failure of petitioner to file brief.

Rule 21 of this Court.
Schooner Catharine v. *United States,* 11 U. S. (7 Cranch) 99.
Ryan v. *Koch,* 84 U. S. (17 Wall.) 19.
Dugger v. *Tavloe,* 121 U. S. 286.
Portland Co. v. *United States,* 15 Wall. 1.
School District v. *Insurance Co.,* 101 U. S. 472.

The only question is whether Rule 21 requires of a petitioner in a certiorari case the filing of briefs on final hearing.

It is true that on its face Rule 21 appears to apply only to "plaintiff in error or appellant." But if this rule be held not to apply to a petitioner in certiorari cases, then there is no rule whatever requiring briefs to be filed upon final hearing in certiorari cases. Certainly this is not to be supposed.

It is evident from the provisions of Section 3 of paragraph 2 of Rule 21 that petitioner must file brief on final hearing, the same as is required of a plaintiff in error or appellant. For the language of that section requires the brief to contain "a reference to the *pages* of the *record.*" When a petitioner files his petition for the writ of certiorari and his brief in support thereof, of course the record upon which the cause will be finally submitted (if the writ should issue) *has*

not yet been printed at all; and his brief accompanying the petition therefore could not contain the page references required by this section of the rule. Obviously the rule contemplates that petitioner in certiorari cases must file a brief for the final hearing, *after the record is printed by the clerk.*

In this connection, we call attention to the fact that it has been held that when the brief fails to point out the page of the record on which an error appears, the error will not ordinarily be considered.

Colorado Marble Co. v. *Collins*, 230 Fed. 78, 144 C. C. A. 276.
Benites v. *Hampton*, 123 U. S. 519.

II.

The brief in support of petition for writ of certiorari, filed by petitioner, does not contain any specification of errors, and therefore should not be held to be a compliance with the rules.

As we understand the rules, the petitioner must file a new brief upon final hearing in certiorari cases, the same as is required of a plaintiff in error and appellant in cases brought here on writ of error and appeal respectively. The petitioner cannot treat the brief filed with his petition for the writ of certiorari as a compliance with this requirement.

But even if this were not so, nevertheless the brief heretofore filed in this cause by the petitioner

in support of the petition, does not comply with the rules, and is wholly insufficient, because it does not contain any specification of errors, as required by Rule 21.

The net result is that this Court does not now have before it in this cause any specification of errors whatsoever. For this reason, also, the appeal should be dismissed.

Benites v. *Hampton,* 123 U. S. 519.
Rowe v. *Phelps,* 152 U. S. 87.
Stevenson v. *Barbour,* 140 U. S. 48.
Camden v. *Stuart,* 144 U. S. 104.
Wood v. *Wilbert Lumber Co.,* 226 U. S. 384.
Fitch v. *Richardson,* 147 Fed. 196, 77 C. C. A. 422.
Sec. 997, 1012, Revised Statutes United States.

For all the foregoing reasons, we respectfully ask that the petition be dismissed.

Respectfully submitted,

WILLIAM S. HOGSETT,
MURAT BOYLE,
MONT T. PREWITT,
Counsel for Respondent.